



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 23, 2003

Ms. Terrie L. Hairston, RN, CHE
Executive Director
Board of Vocational Nurse Examiners
333 Guadalupe Street, Suite 3-400
Austin, Texas 78701

OR2003-2728

Dear Ms. Hairston:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179920.

The Board of Vocational Nurse Examiners (the "board") received a request for any documents related to complaints or disciplinary action taken against a named individual, including licensing information. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted to this office by two interested third parties. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

The submitted information contains medical record information, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This information must be released upon the signed, written consent of the patient, or the personal representative of a deceased patient, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the submitted information that is subject to the MPA.

In regard to the remaining submitted information, section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A government body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the government body receives the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588. In this instance, you state that the board "has compiled a record that establishes certain statutory violations or grounds for disciplinary action" and that "this information was compiled in anticipation of litigation." You also state "the informal disposition or litigation of this contested case is currently pending in this matter pursuant to [section] 302.411 of the Occupations Code" and that "further litigation

of this contested case is anticipated before the State Office of Administrative Hearings pursuant to [section] 302.455 of the Occupations Code.” Thus, we conclude that the board has shown that litigation, in the form of a contested case under the APA, was pending in this matter prior to the receipt of the present request for information. We further conclude that the submitted information relates to the pending litigation for purposes of section 552.103(a). Therefore, most of the remaining submitted information may be withheld pursuant to section 552.103 of the Government Code.¹

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Upon review of the submitted information, we note that portions of the information, which we have marked, have either been obtained from or provided to the opposing party. Therefore, this information may not be withheld pursuant to section 552.103 of the Government Code. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In regard to the information that may not be withheld under section 552.103, you assert common-law privacy. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses the doctrine of common-law privacy. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Having reviewed the remaining responsive information, we conclude that it is not highly intimate or embarrassing. Therefore, this information is not protected by common-law privacy, and it may not be withheld under section 552.101 of the Government Code.

You also assert that the social security number contained in the remaining information is confidential under section 552.101. Section 552.101 encompasses information protected by other statutes, such as section 56.001 of the Occupations Code, which provides as follows:

¹ As we are able to make this determination, we need not address your arguments under section 552.111 of the Government Code, section 242.127 of the Health & Safety Code, and criminal history record information.

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 56.001. You state that the social security number at issue belongs to a licensee. However, you do not inform us, nor does it appear from our review of the submitted information, that the social security number was provided to the board by the individual as an applicant or holder of a license, certificate of registration, or other legal authorization to practice in a specified occupation or profession. *See id.* Accordingly, we conclude that the board has failed to establish the applicability of section 56.001 of the Occupations Code to the social security number at issue. Therefore, you may not withhold the social security number from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 56.001.

However, a social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number in the responsive information is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Public Information Act (the "Act") on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the board should ensure that no such information was obtained or is maintained by the board pursuant to any provision of law enacted on or after October 1, 1990.

Further, we note that section 6103(a) of Title 26 of the United States Code makes confidential certain tax return information, including Form W-4, the Employee's Withholding Allowance Certificate. Open Records Decision No. 600 at 8-9 (1992). The board therefore must withhold Form W-4, which we have marked, under section 552.101.

Finally, we note that section 552.130 prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, the board must withhold the Texas driver's license information we have marked pursuant to section 552.130 of the Government Code.

In summary, we conclude that: 1) the medical record information we have marked may be released only as provided under the MPA; 2) except for the additional information we have marked, the remaining information may be withheld under section 552.103 of the

Government Code. In regard to the information that may not be withheld under the MPA and section 552.103, we conclude that: 3) the social security number we have marked may be confidential under federal law; 4) you must withhold Form W-4, which we have marked, under section 552.101; 4) you must withhold the section 552.130 information we have marked; and 5) all remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 179920

Enc: Submitted documents

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